No. 89-372

Supreme Court, U.S.
FILED
OCT 5 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

AMANDA ACQUISITION CORPORATION,
Petitioner,

—v.—

UNIVERSAL FOODS CORPORATION, ALAN R. ANDERSON, MICHAEL E. BATTEN, DR. OLAN D. FORKER, DR. CAROL I. WASLIEN GHAZAII, LEON T. KENDALL, PAUL L. KOHNSTAMM, CHARLES S. MCNEER, ORVILLE R. MERTZ, JOHN L. MURRAY, DR. BERNARD S. SCHWEIGERT, GUY A. OSBORN, GERARD E. VENEMAN and DARRELL E. WILDE,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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No. 89-372

AMANDA ACQUISITION CORPORATION,

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—v.—

UNIVERSAL FOODS CORPORATION, ALAN R. ANDERSON, MICHAEL E. BATTEN, DR. OLAN D. FORKER, DR. CAROL I. WASLIEN GHAZAII, LEON T. KENDALL, PAUL L. KOHNSTAMM, CHARLES S. MCNEER, ORVILLE R. MERTZ, JOHN L. MURRAY, DR. BERNARD S. SCHWEIGERT, GUY A. OSBORN, GERARD E. VENEMAN and DARRELL E. WILDE,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

1. Respondents' timeliness objection is frivolous. Under 28 U.S.C. § 2101(c), the ninety (90) day period within which a petition for certiorari must be filed commences on the date of entry of the challenged lower court judgment.[1] Entry occurs

1 28 U.S.C. § 2101(c) provides that "any writ of certiorari intended to bring any judgment . . . before the Supreme Court for review shall be taken or applied for within ninety days after the *entry* of such judgment or decree" (emphasis added).

when the judgment is noted in the lower court's docket.[2] It is undisputed that the Seventh Circuit judgment was noted on that court's docket on May 30, 1989,[3] and judgment was therefore entered on that date. It is equally undisputed that Petitioner's filing was within 90 days of that date.

Both the Chief Judge and Clerk of the Seventh Circuit so apprised this Court and Respondents' counsel. In response to an inquiry by the Clerk of this Court, the Clerk of the Seventh Circuit, in a letter dated August 30, 1989, advised that judgment was entered below on May 30, 1989. He wrote that "the docket entry of that judgment on our AIMS (Appellate Information Management System) docket . . . was not made until Tuesday, May 30, 1989. *Chief Judge William J. Bauer of this court has advised me that, for purposes of the first sentence of Rule 36 of the Federal Rules of Appellate Procedure, that latter date should be the one that controls.*" (Supp. App. at 4; emphasis added.) A copy of this letter was sent to defense counsel. (*See* Supp. App. at 4.) Pursuant to Rule 20.3 of this Court, the Clerk of this Court duly received the Petition as timely filed on August 28.[4]

2. Respondents' mootness contention is frivolous. The fact the Petitioner's Tender Offer has expired demonstrates the vitality, not the mootness, of its Petition. As Petitioner explained in its Supplemental Brief, it allowed the Offer to expire because the Offer was thoroughly moribund as a result of the Seventh Circuit Opinion: the Offer could not be consum-

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2 Rule 36 of the Federal Rules of Appellate Procedure provides that "[t]he *notation* of a judgment in the docket *constitutes entry* of the judgment" (emphasis added).

3 The docket sheet of the Court of Appeals for the Seventh Circuit reflects that the final judgment was entered on May 30, 1989. (*See* Supplemental Appendix ("Supp. App.") at 2: "Entry date 5/30/89.") Moreover, the judgment on file in the Court of Appeals recites that it was "ENTERED MAY 30 1989 ON AIMS." (*See* Supp. App. at 3.) AIMS (the Appellate Information Management System) is the only docket of the Seventh Circuit.

4 Rule 20.3 provides that: "The Clerk will refuse to receive any petition for a writ of certiorari which is jurisdictionally out of time."

mated in light of the Wisconsin Business Combination Act. That is the reason the Petition was filed. Further, to keep the Offer open would have cost Petitioner approximately $6,000 per day in additional financing fees, even though spending this money would be pointless. (*See* Petitioner's Supplemental Brief ("Supp. Br.") at 2.) Respondents have chosen to ignore Petitioner's Supplemental Brief and do not dispute that Petitioner remains interested in acquiring Universal. (Supp. Br. at 2.) Petitioner has proved that already, having spent approximately $16.5 million in pursuit of Universal (Supp. Br. at 2). It is not required to waste another $6,000 a day on the futile gesture of keeping a stymied Tender Offer nominally open.[5]

3. Respondents have conceded that there is a conflict among the Circuits concerning applicability of the *Pike* balancing test in Commerce Clause cases. Respondents attempt to bury the conflict by analyzing the decision below as though it—and *CTS*—were *sui generis*, purporting to distinguish "any balancing analysis required by the Commerce Clause in the context of *other* state regulations in *other* areas of commerce" (Resp. Br. at 14 (emphasis in original); *see generally id.* at 14-15 and n. 9.) Respondents' argument proves Petitioner's point. This Court did not purport to be creating a new or *sui generis* Commerce Clause analysis for State takeover statutes in *CTS*. It did not address the question at all—thus the confusion in the lower courts and among commentators since *CTS*. (*See* Petitioner's Brief at 20-22.) Indeed, two days after the Petition was filed, the Ninth Circuit took the position—directly opposed to that of the court below—that *Pike* balancing is mandated in reviewing evenhanded, traditional state legislation that does not directly regulate interstate commerce. *See Hass v. Oregon State Bar*,

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5 In addition, Petitioner remains a Universal shareholder, the value of whose shares is affected by the Wisconsin Business Combination Act. For this reason, too, the cases cited by Respondent are inapposite because Petitioner retains an economic motive in seeking reversal of the judgment below.

[1989-2] Trade Cas. (CCH) ¶ 68,732 at 61,859 (9th Cir. Aug. 30, 1989). This confusion should be rectified.[6]

4. Respondents' arguments against review are grounded in pretext. In urging that a writ not issue, Respondents' briefs rest squarely on the contention that the Wisconsin Act is a typical State law regulating internal corporate governance and does not directly implicate the tender offer process. (*See, e.g.*, Resp. Br. at 5, 9, 14; Brief of Respondent Wisconsin Attorney General at 7, 12, 16.) But that contention—apt as it may have been in *CTS*—is groundless in this case. It ignores the facts found by the District Court, and left undisturbed by the Court of Appeals, that the Wisconsin Act is protectionist by intent, design and effect. (*See* Petition at 4-5, 12, 28.) The Wisconsin Act does not represent bona fide, traditional regulation of internal corporate affairs but is expressly designed to halt interstate tender offers for shares of Wisconsin corporations, and it succeeds in having that effect. (*Id.* at 4-5, 16-17, 19-20.)

Can a State forbid interstate tender offers for shares in corporations incorporated in that State? Pretexts aside, that is an ultimate question presented by the Petition, and it has never been considered by this Court. The respondents do not directly address it. This Court should grant certiorari to decide it.

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6 A good deal of the confusion arises, for example, from the fact that some courts and commentators read *CTS* as silently performing a *Pike* balancing analysis. The *CTS* majority, on this view, satisfied itself that the Indiana control share statute actually served a legitimate State interest—by "ensuring that investors in [domestic] corporations have an effective voice in corporate affairs." *CTS*, 481 U.S. at 91. The *CTS* opinion is thought by some to have engaged in balancing local benefits against burdens on interstate commerce when it characterized the goal of protecting against the "possibility of coercion" in some takeover bids as providing "additional justification for Indiana's decision to promote the autonomy of independent shareholders." *CTS*, 481 U.S. at 92.

CONCLUSION

A writ of certiorari should issue to permit the Court to clarify the status of the *Pike* balancing test and to define the limits of State power to impede—and effectively stymie—the national tender offer process.

Dated: New York, New York
October 4, 1989

Respectfully submitted,

Gregory P. Joseph*
Stephen Lew
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SUPPLEMENTAL APPENDIX

STATUTORY PROVISIONS

28 U.S.C. § 2101(c).

Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

Fed. R. App. P. 36.

The notation of a judgment in the docket constitutes entry of the judgment. The clerk shall prepare, sign and enter the judgment following receipt of the opinion of the court unless the opinion directs settlement of the form of the judgment, in which event the clerk shall prepare, sign and enter the judgment following final settlement by the court. If a judgment is rendered without an opinion, the clerk shall prepare, sign and enter the judgment following instructions from the court. The clerk shall, on the date judgment is entered, mail to all parties a copy of the opinion, if any, or of the judgment if no opinion was written, and notice of the date of entry of the judgment.

Sup. Ct. R. 20.3.

The Clerk will refuse to receive any petition for a writ of certiorari which is jurisdictionally out of time.

5/24/89	ORDER: Final judgment, AFFIRMED Amanda Acquisition pays costs. [43098-1] (ther) [Entry date 5/30/89] [89-1581 89-1712]
6/15/89	MANDATE ISSUED. Record on appeal to be returned later. [89-1581, 89-1712] [43098-1] Mandate issuance due (mabe) [Entry date 6/20/89] [89-1581 89-1712]
6/21/89	Filed mandate receipt. [89-1581, 89-1712] [43098-1] (mabe) [Entry date 6/26/89] [89-1581 89-1712]

A-2

JUDGMENT — ORAL ARGUMENT

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinos 60604

ENTERED

May 24, 19 89. MAY 30 1989

ON AIMS

Before

Hon. WILLIAM J. BAUER, Chief Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge.

Hon. HUBERT L. WILL, Senior District Court Judge *

A-3

AMANDA ACQUISITION CORPORATION,
Plaintiff-Appellant,
Cross-Appellee,

No. 89-1581 and 89-1712 vs.

UNIVERSAL FOODS CORPORATION, et al.,
Defendants-Appellees,
Cross-Appellants.

Appeals from the United States District Court for the Eastern District of Wisconsin
No. 88 C 1296
Judge Joseph P. Stadtmueller

This cause was heard on the record from the United States District Court for the Eastern District of Wisconsin, _____ Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the order of this Court entered this date. Amanda Acquisition Corporation pays costs.

*Hon. Hubert L. Will, Senior District Judge for the Northern District of Illinois, sitting by designation.

United States Court of Appeals
For The Seventh Circuit
219 South Dearborn Street
Chicago, Illinois 60604

Thomas F. Strubbe
Clerk
312-435-5850

August 30, 1989

Mr. Joseph F. Spaniol, Jr.
Clerk
Supreme Court of the United States
1 First Street, N.E.
Washington, DC 20543

A-4

Re: Amanda Acquisition Corporation v Universal Foods Corporation, et al., Case Nos. 89-1581 and 89-1712

Dear Mr. Spaniol:

On Wednesday, May 24, 1989 this court filed its opinion in the above entitled appeals. A judgment form was typed and mailed to counsel on that date. However, the docket entry of that judgment on our AIMS (Appellate Information Management System) docket of that judgment was not made until Tuesday, May 30, 1989. Chief Judge William J. Bauer of this court has advised me that, for purposes of the first sentence of Rule 36 of the Federal Rules of Appellate Procedure, that latter date should be the one that controls.

I hope this will clarify the matter.

Very truly yours,

Thomas F. Strubbe

cc: Gregory P. Joseph
John R. Dawson